Supreme Court, U.S.

97 932 DEC - 3 1997

OFFICE OF THE CLERK

NO. 97-_____

In The

# Supreme Court of the United States

October Term, 1997

**M. F. GUETERSLOH, JR.,**
*Petitioner,*

vs.

**THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; THE CITY OF LUBBOCK; and JAMES MILLER, RECEIVER OF THE CARLISLE WATER SUPPLY COMPANY,**
*Respondents.*

*On Petition For Writ of Certiorari*
*To The Texas Court of Appeals, Third District, at Austin*

## PETITION FOR WRIT OF CERTIORARI

JAMES DOUGLAS RAY
406 W. 13th Street, Suite 200
Austin, Texas 78701
Tel: (512) 478-8698
Fax: (512) 478-2778

ATTORNEY FOR THE PETITIONER

December 3, 1997

NO. 97-_____

In The

# Supreme Court of the United States

October Term, 1997

**M. F. GUETERSLOH, JR.,**
*Petitioner,*

vs.

**THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; THE CITY OF LUBBOCK; and JAMES MILLER, RECEIVER OF THE CARLISLE WATER SUPPLY COMPANY,**
*Respondents.*

*On Petition For Writ of Certiorari*
*To The Texas Court of Appeals, Third District, at Austin*

## PETITION FOR WRIT OF CERTIORARI

JAMES DOUGLAS RAY
406 W. 13th Street, Suite 200
Austin, Texas 78701
Tel: (512) 478-8698
Fax: (512) 478-2778

ATTORNEY FOR THE PETITIONER

December 3, 1997

## QUESTION PRESENTED FOR REVIEW

In the event of a taking, does *res judicata* bar property owners from litigating their Fifth Amendment right to just compensation once they have been unsuccessful in their attempt to obtain compensation through procedures provided by the state?

## LIST OF PARTIES

The parties to the proceeding below were the Petitioner, M. F. Guetersloh, Jr., and the Respondents, the State of Texas, the Public Utility Commission, the Texas Water Commission, the City of Lubbock, and James Miller as Receiver of the Carlisle Water Supply Company.

## TABLE OF CONTENTS

Question Presented for Review ..... i

List of Parties ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Opinions Below ..... 2

Statement of Jurisdiction ..... 4

Constitutional Provisions and Statutes Involved ..... 5

Statement of the Case ..... 7

Reasons for Granting the Writ ..... 10

The Texas Courts Failed To Properly Analyze The Federal Constitutional Principles Involved When They Barred This Property Owner From Asserting His Fifth Amendment RightTo Just Compensation ..... 10

Even If Compelled By State Procedural Law, The Judgment Rendered In Guetersloh I Results In A Denial Of Due Process, And Is Not Entitled To Preclusive Effect ..... 23

Conclusion ..... 30

Appendix ..... A1-N1

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Allen v. McCurry*, 449 U.S. 90 (1980) ..... 22

*Armstrong v. United States*,
364 U.S. 40 (1960) ..... 29

*Armstrong World Indus., Inc. v. Adams*,
961 F.2d 405 (3d Cir. 1992) ..... 15

*Barr v. Resolution Trust Corp.*,
837 S.W. 2d 627 (Tex. 1992) ..... 18

*Bivens v. Six Unknown Agents*, 403 U.S.
388 (1971) ..... 28

*Boilermakers v. Hardeman*, 401 U.S. 233
(1971) ..... 28

*Chicago, Burlington & Quincy R.R. v.*
*City of Chicago*, 166 U.S. 226 (1897) ..... 25-27

*City of El Paso v. Madero*, 803 S.W.2d
396 (Tex. App.--El Paso 1991, writ denied),
*cert. denied*, 502 U.S. 1073 (1992) ..... 15

*City of Grand Prairie v. Sisters of Holy*
*Family of Nazareth*, 868 S.W.2d 835 (Tex.App.–
Dallas 1993, writ denied), *cert. denied*,
513 U.S. 929 (1994) ..... 10, 18

*Cope v. Anderson*, 331 U.S. 461 (1947) ..... 18

## TABLE OF AUTHORITIES (Continued)

**Cases:** **Page**

*Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992) ..... 24

*Empire Trust Co., v. United States*, 324 F.2d 507 (5th Cir. 1963) ..... 19-20

*England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964) ..... 22-23

*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) ..... 16, 25

*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992 ..... 9, 11, 21-23

*Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966) *aff'd*, 405 F.2d 138 (6th Cir. 1968) ..... 25-26

*Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex. 1992) ..... 19

*Guetersloh v. Public Utility Comm'n*, No. 3-90-161-CV (Tex. App.–Austin August 14, 1991, writ denied) .... 3, 8, 12-14, 17, 18, 21, 23, 25, 27-28

*Guetersloh v. State of Texas*, No. 93-8729 (5th Cir. June 3, 1994) *cert. denied*, 513 U.S. 1076 (1995) ..... 2, 8

*Guetersloh v. State of Texas*, 930 S.W.2d 284 (Tex. App.–Austin 1996, writ denied) ..... 2, 4, 19, 21, 23

## TABLE OF AUTHORITIES (Continued)

**Cases:** **Page**

*Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). ..... 10

*Holmes v. Jones*, 738 F.2d 711 (5th Cir. 1984) ..... 21

*Hudson v. Palmer*, 468 U.S. 517 (1984) ..... 24-25

*Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976) ..... 9, 21-23

*Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) ..... 24, 25

*Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990) ..... 11, 12, 15-16, 20

*Lewis v. East Feliciana Parish School Bd.*, 820 F.2d 143 (5th Cir. 1987) ..... 23

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ..... 16-17, 27-28

*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) ..... 20

*Martin v. Brodrick*, 177 F.2d 886, 888 (10th Cir. 1949) ..... 20

## TABLE OF AUTHORITIES (Continued)

**Cases:** **Page**

*McCoy v. Union Elevated Ry.*, 247 U.S. 354 (1918) ..... 26

*Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) ..... 17, 22

*Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) ..... 26

*Nixon v. Mr. Property Management Co.*, 675 S.W.2d 585 (Tex. 1984) ..... 24

*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ..... 17, 27-28

*Norco Constr. Co., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) ..... 20

*Oregon v. Kennedy*, 456 U.S. 667 (1982) ..... 24

*Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989) ..... 12, 25

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ..... 16

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) ..... 24

## TABLE OF AUTHORITIES (Continued)

**Cases:** **Page**

*Rawlings v. Ray*, 312 U.S. 96 (1941) ..... 18

*Richmond Elks Hall Ass'n v. Richmond Dev.*,
561 F.2d 1327, 1330 (9th Cir. 1977) ..... 26

*Samaad v. City of Dallas*,
940 F.2d 925 (5th Cir. 1991) ..... 11, 23

*Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) ..... 24

*Southern Jam, Inc. v Robinson*, 675 F.2d 94
(5th Cir. 1982) ..... 18

*Taub v. City of Deer Park*, 882 S.W.2d 824
(Tex. 1994) ..... 29

*Town of Sunnyville v. Mayhew*, 905 S.W.2d 234
(Tex. App.--Dallas 1994, writ granted) ..... 15, 16

*Williamson County Regional Planning
Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) .... *passim*

**Constitutional Provisions**

U.S. CONST. amend V ..... *passim*

U.S. CONST. amend XI ..... 21

U.S. CONST. amend. XIV ..... *passim*

TEX. CONST. art. 1 § 17 ..... 8, 13-14, 24

## TABLE OF AUTHORITIES (Continued)

**Statutes and Regulations** **Page**

28 U.S.C. § 1257(a) ..... 4

28 U.S.C. § 1738 ..... 5, 10, 17

42 U.S.C. § 1983 ..... 4, 6, 20

TEX. R. CIV. P. 48 ..... 6, 18, 20

TEX. R. CIV. P. 51b ..... 6, 18-19, 20

**Other Authorities**

18 AM. JUR., Eminent Domain §§ 144, 145 pp. 772-3 (1938) ..... 26

Thomas E. Roberts, *Fifth Amendment Taking Claims In Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. 479 (1992) ..... 11

NO. 97-_____

In The

# Supreme Court of the United States

October Term, 1997

**M. F. GUETERSLOH, JR.,**
*Petitioner,*

vs.

**THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; THE CITY OF LUBBOCK; and JAMES MILLER, RECEIVER OF THE CARLISLE WATER SUPPLY COMPANY,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

## PETITION FOR WRIT OF CERTIORARI

PETITIONER, M.F. GUETERSLOH, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Appeals, Third District, at Austin, entered in the above-referenced cause on September 18, 1996. The Supreme Court of Texas denied discretionary review of that published decision on July 31, 1997, and overruled Petitioner's timely-filed Motion for Rehearing on September 4, 1997.

## OPINIONS BELOW

The September 18, 1996 opinion and judgment of the Texas Court of Appeals, Third District, at Austin in Case No. 03-95-00626-CV, is reported at 930 S.W.2d 284 and is reprinted and attached hereto, as Appendix "A," *infra*, at page App. A-1.

On September 6, 1995, the 261st Judicial District Court of Texas, granted summary judgment in favor of the State of Texas, the Public Utilities Commission, the Texas Water Commission, the City of Lubbock, and James Miller in Cause No. 95-07117. That decision is not reported. The Order Granting Summary Judgment is reprinted and attached hereto as Appendix "B," *infra*, at page App. B-1.

On July 31, 1997, the Texas Supreme Court denied discretionary review of Petitioner's timely filed Application for Writ of Error, in Case No. 96-1257 with the notation of "Writ Denied." A memorandum of that decision is reprinted and attached hereto as Appendix "C," *infra*, at page App. C-1.

On September 4, 1997, the Texas Supreme Court overruled Petitioner's Motion for Rehearing of the Application for Writ of Error filed in Cause No. 96-1257, without opinion. A memorandum of that decision is reprinted and attached hereto as Appendix "D," *infra*, at page App. D-1.

* * *

On June 3, 1994, the United States Court of Appeals for the Fifth Circuit, issued an unpublished opinion in Case No. 93-8729. A copy of that opinion is reprinted and attached hereto as Appendix "E," *infra*, at page App. E-1.

On September 17, 1993, the United States District Court for the Western District of Texas Austin Division, issued a written Order in Case No. A-92-CA-359. A copy of that unpublished order is reprinted and attached hereto as Appendix "F," *infra*, at page App. F-1.

On January 9, 1995, the United States Supreme Court denied the petition for writ of certiorari in Cause No. 94-393. A copy of that denial is reprinted and attached hereto as Appendix "G," *infra*, at page App. G-1.

* * *

On August 14, 1991, the Texas Court of Appeals, Third District at Austin, issued an unpublished opinion in Cause No. 3-90-161-CV. A copy of that opinion is reprinted and attached hereto as Appendix "H," *infra*, at page App. H-1.

On February 23, 1990, the 353rd Judicial District Court of Travis County, Texas, issued a Final Judgment Order in Case No. 461-447. A copy of that order is reprinted and attached hereto as Appendix "I," *infra*, at page App. I-1.

On February 13, 1989, the 137th Judicial District Court of Lubbock County, Texas, granted Defendant's Summary Judgment in Case No. 85-512,245. A copy of that order is reprinted and attached hereto as Appendix "J," *infra*, at page App. J-1.

On February 13, 1989, the 137th Judicial District Court of Lubbock County, Texas, Denied Plaintiff's Motion for Summary Judgment and Granted Defendant's Motion for Summary Judgment in Cause No. 85-512,245. A copy of that order is reprinted and attached hereto as Appendix "K," *infra*, at page K-1.

On February 13, 1989, the 137th Judicial District Court of Lubbock County, Texas, issued a Final Summary Judgment Order in Cause No. 85-512,245. A copy of that order is reprinted and attached hereto as Appendix "L," *infra*, at page App. L-1.

On February 5, 1992 the Supreme Court of Texas denied Petitioner's Application for Writ of Error in Case No. D-1725. A copy of that order is reprinted and attached hereto as Appendix "M," *infra*, at page App. M-1.

On March 4, 1992, the Supreme Court of Texas denied the of Motion for Rehearing in Case No. D-1725. A copy of that order is reprinted and attached hereto as Appendix "N," *infra*, at page App. "N-1".

---

## STATEMENT OF JURISDICTION

Asserting an entitlement to just compensation under the Fifth and Fourteenth Amendments, as well as under 42 U.S.C. §1983, the petitioner brought suit in the 261st Judicial District Court of Texas. Summary judgment was granted in favor of all defendants on the sole basis of *res judicata*. Petitioner seeks review of the September 18, 1996 opinion and judgment of the Texas Court of Appeals, Third District, at Austin, upholding that summary judgment. Petitioner's timely-filed application for discretionary review was denied by the Texas Supreme Court on July 31, 1997, and Petitioner's subsequent Motion for Rehearing was overruled on September 4, 1997. The Supreme Court has jurisdiction to review such cases from state courts by virtue of 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1738 states that:

"The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

42 U.S.C. § 1983 provides, in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 48 of the Texas Rules of Civil Procedure provides that "a party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses...."

Rule 51 of the Texas Rules of Civil Procedure provides, in pertinent part, that:

(a) Joinder of Claims. "The plaintiff in his petition ... may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party...."

(b) Joinder of Remedies. "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive right of the parties...."

---

## STATEMENT OF THE CASE

This is an inverse condemnation action in which Petitioner's suit for just compensation under the Fifth and Fourteenth Amendments was procedurally barred, in state court, under the sole theory of *res judicata*. In 1978, M.F. Guetersloh, Jr., "Petitioner," sold a private water supply company, retaining a vendor's lien and deed of trust to secure payment for his facility. Several years after that sale, the State placed the utility in receivership. During the pendency of that receivership, Mr. Guetersloh was paid nothing on his underlying lien, and he foreclosed on his security. Following that foreclosure, the State of Texas judicially enjoined Petitioner from entering onto, or otherwise interfering with the State's use of his property.

For nearly five years, the receivership continued, and residents of the community of Carlisle, Texas, were charged a fee for water service provided by Mr. Guetersloh's facility. However, despite the availability of alternative water providers in the area, Petitioner was paid nothing, during the period of that receivership, for the protracted use and destruction of his facility.

Ultimately, the City of Lubbock annexed the Carlisle service area and built a new water system, but Petitioner's water supply was kept in receivership until the new water system was completed and began providing water service to Mr. Guetersloh's former customers. Once the City's new water system was completed, the receivership was concluded, and Mr. Guetersloh was granted permission to reclaim possession of his utility. By that time, all of Petitioner's customers were gone, the facility was worn out and badly in need of repair, and his water system was completely worthless, as a utility.

In 1985, while the receivership was still pending, Mr. Guetersloh unsuccessfully sued the State of Texas and various of its agencies and representatives for an uncompensated "taking."

Although initially asserting an entitlement to just or adequate compensation according to the dictates of the Fifth and Fourteenth Amendments, as well as Article 1, Section 17 of the Texas Constitution, Petitioner subsequently deleted his federal constitutional claims, and pursued only his state compensation remedies once he became aware of this Court's holding in *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson County*, this Court held that due to their "special nature," claims for just compensation premised on the Fifth Amendment are premature or unripe until a property owner "has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Id.*, at 195.

In Guetersloh I, the Texas Court of Appeals upheld summary judgment in favor of the State and the City of Lubbock because the court determined that the alleged taking constituted a valid exercise of the state's police power, for which no compensation is required. *Guetersloh v. Public Utility* Comm., et al., No. 3-90-161-CV(Tex. App.-- Austin Aug. 14, 1991, writ denied)(not designated for publication). Without even so much as commenting upon the economic consequences of the regulation, as applied, the Court of Appeals found that such a valid exercise of police power does not constitute a compensable"taking" where:"(1) the regulation is adopted to accomplish a legitimate goal, ...; and (2) the regulation is reasonable, not arbitrary." (Slip Op. at 6-7). The Texas Supreme Court denied discretionary review, and Petitioner brought suit in federal court, asserting an entitlement to just compensation for his now "ripened" Fifth and Fourteenth Amendment claims.

The federal courts, however, held that the Eleventh Amendment precluded that suit in federal court. *Guetersloh v. State of Texas*, No. 93-8729 (5th Cir. June 3, 1994)(not designated for publication), *cert. denied*, 513 U.S. 1076 (1995). Petitioner then asserted the present Fifth Amendment takings claim in state

court. The State, along with the City of Lubbock, again filed motions for summary judgment which the trial court granted on the sole basis of *res judicata.* The Austin Court of Appeals affirmed.

Perhaps in some concession to the obvious inconsistency of having a question of federal constitutional law that is simultaneously "ripe"for adjudication in state court, and "unripe" or "premature" in a federal court, the Austin Court of Appeals offered an alternative holding. In reaching its result, the Court stated that it had applied the holding of *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992), to conclude that Mr. Guetersloh had somehow waived his federal constitutional claims by failing to make a "*Jennings*" reservation of his federal claims for subsequent litigation in federal court. *See Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897 (1976).

The Texas Supreme Court again denied Petitioner's timely-filed request for discretionary review, and on September 4, 1997, Petitioner's Motion for Rehearing was rejected.

## REASONS FOR GRANTING THE WRIT

### THE TEXAS COURTS FAILED TO PROPERLY ANALYZE THE FEDERAL CONSTITUTIONAL PRINCIPLES INVOLVED WHEN THEY BARRED THIS PROPERTY OWNER FROM ASSERTING HIS FIFTH AMENDMENT RIGHT TO JUST COMPENSATION.

This Petition invites the Court to clarify and put to rest an important conflict that persists in the always troublesome field of regulatory takings law. Since this Court decided *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), property owners have struggled in their attempt to balance the jurisdictional dilemma created by that holding, with the necessary interplay of 28 U.S.C.A. §1738 and traditional notions of *res judicata*.[1] The question that remains to be answered is whether property owners who suffer takings under the guise of state regulation are entitled to litigate their Fifth Amendment right to just compensation once they have satisfied the "ripeness" requirements announced in that decision.

Today, virtually every court that has dealt with the matter recognizes that the Fifth Amendment does not proscribe the taking of property; it proscribes takings without just compensation. *See, e.g., City of Grand Prairie v. Sisters of Holy Family of Nazareth*, 868 S.W.2d 835, 844 (Tex. App. -- Dallas, writ denied), *cert. denied*, 513 U.S. 929 (1994); *citing Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981). For that reason, litigants who wish to assert a "takings" claim under the Fifth and Fourteenth Amendments must

---

[1] 28 U.S.C. Section 1738 provides that:

"[The Acts of the legislature of any State, Territory, or Possession of the United States or] ... records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court with in the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

establish two elements or "ripeness" requirements; (1) that a "taking" occurred, and (2) that the owner has unsuccessfully sought compensation from the state. *Williamson County* 473 U.S. at 194; see also, *Samaad v. City of Dallas*, 940 F.2d 925, 933 (5th Cir. 1991).

As will be apparent upon review of the published decision in this case, property owners now find it increasingly difficult, if not impossible, to litigate their entitlement to just compensation under the Fifth Amendment once those ripeness requirements have actually been satisfied. The reason for this difficulty is that when litigants attempt to assert their takings claims under relevant state procedures, most state courts recognize res judicata doctrines that require state court litigants to assert their federal takings claims, under penalty of bar, *concurrently* with their state compensation claims. See, e.g., *Fields v. Sarasota Manatee Airport Auth.* , 953 F.2d 1299, 1303 (11th Cir. 1992). This is so despite the clearly acknowledged holding of this Court that the federal constitution is not violated until just compensation has been denied by the state. *Williamson County*, 473 U.S. at 194, n.13; *see also, Lake Lucerne Civic Assn., Inc. v. Dolphin Stadium Corp,* 878 F.2d 1360, 1372 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990).

The present case illustrates the dilemma faced by property owners in this context, and affords this Court a unique opportunity to narrowly and directly address the recurring question of when, and under what circumstances, litigants should properly assert their entitlement to just compensation under the Fifth and Fourteenth Amendments. That issue has generated considerable confusion among state and federal courts, alike. *See, e.g.*, Thomas E. Roberts, *Fifth Amendment Taking Claims In Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. 479 (1992). Applying traditional notions of *res judicata* to federal "takings" challenges, the Eleventh Circuit has allowed property owners to advance their takings claims in federal

court despite prior unsuccessful state court litigation. *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d at 1372-73. In *Peduto v.City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989), the Third Circuit has reached the opposite result.

Until this important question is addressed and resolved by this Honorable Court, property owners who are unfortunate enough to be required to litigate such "takings" claims against a state or its agencies will continue to find themselves on the horns of this dilemma. If they attempt to assert their Fifth Amendment rights along with available state remedies, their federal takings claims are routinely dismissed as "unripe." On the other hand, litigants such as this Petitioner, who adhere to the commands of this Court and wait to assert their federal constitutional rights until they have actually accrued, find that they are procedurally barred from litigating those claims by principles of *res judicata*. As is illustrated by Petitioner's plight, this "heads I win, tails you lose" approach to such an important constitutional entitlement effectively converts the Fifth Amendment promise of just compensation into a constitutional right without a remedy.

In Guetersloh I, it was determined that a receivership imposed on the Carlisle Water Supply constituted a legitimate exercise of the State's police power. As authorized by the State, that receivership purported to allow government agents to come onto Mr. Guetersloh's land, seize his assets, run his utility as if it were their own, charge for its benefits, and pay nothing for the privilege. That those actions were taken for a beneficial purpose - from the public's point of view, adds nothing to the debate.

There is no contest that the order of the Commission qualifies under the "public purpose" requirement of the Fifth Amendment- it does. Rather, what is significant here is that under these facts, it is the established policy of the state to do what it did, without consideration of the rights of the true owner.

The present case assumes the legitimacy of that undertaking, but focuses on the way and manner in which the State applied its receivership powers to Mr. Guetersloh. Regardless of when or how these claims arise, the State contends that a prior summary judgment which completely ignored the economic impact of this regulation is dispositive of Mr. Guetersloh's complaint. Petitioner respectfully asserts that that argument is premised upon a faulty application of res judicata, and misperceives the underlying Fifth and Fourteenth Amendment rights at issue.

**Background of the Litigation**

In 1985, Mr. Guetersloh foreclosed on a deed of trust and became the owner of the Carlisle Water Supply. Subsequent to his foreclosure, the State obtained a temporary restraining order prohibiting him from interfering with a state-appointed receiver's right to possession of the property. Petitioner filed his initial lawsuit three days later, asserting a taking under the Texas Constitution. That lawsuit was filed on December 9, 1985, and forms the basis for what has been referred to in these proceedings as Guetersloh I. All issues addressed in that lawsuit were disposed of by summary judgment, and those summary judgments were upheld on appeal.

It is undisputed that during the pendency of this five year receivership, the State used Mr. Guetersloh's utility to provide retail water service to the residents of Carlisle. Despite the availability of not less than four other available utilities, Mr. Guetersloh's property was required to provide this public service because it was the "best" of the available alternatives. Petitioner's customers were charged for this service, but Mr. Guetersloh was paid nothing in return. Once there was no further need for his property, the State returned a worthless and worn out set of pumps, pipes, and a depleted water well that had absolutely no further value as a utility.

Guetersloh I was filed approximately twenty-seven (27) months into a receivership that lasted nearly five years. In his initial cause of action, Petitioner first attacked the legitimacy of the State's action, and asserted that *imposition* of the receivership, together with the *intended* use of the facility by the State, constituted a compensable taking event. In his initial prayer for relief, Mr. Guetersloh requested an injunction against the State defendants from taking his property without first paying just compensation. On April 15, 1987, approximately sixteen months after Mr. Guetersloh filed his initial lawsuit, the Carlisle service area was annexed by the City of Lubbock. Once the City of Lubbock began providing water services to the residents of Carlisle, the receivership was dissolved. Guetersloh I was then amended to include a complaint about the effect of extending the City of Lubbock's water service into the Carlisle service area. Those amended complaints were reviewed pursuant only to Article 1, Section 17 of the Texas Constitution.

In affirming summary judgment for the State, the Austin Court of Appeals held that "the Commission's authority to *seek* a receivership against this utility was a valid exercise of the state's police power rather than a "taking." Slip Op. at p.7 (Guetersloh I)(emphasis added). The State argued below that under the "transactional" approach to *res judicata* adopted by this state, Petitioner should have brought his Fifth Amendment claim in that prior proceeding. That assertion, however, ignores the fact that at the time of Guetersloh I, such a claim did not exist.

As this Court has previously held, if the state has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Williamson County*, 473 U.S. at 194, n.13. As a result, property owners, such as Mr.Guetersloh,"cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." *Id.*, at 195. According to the Eleventh

Circuit, "absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right." *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d at 1368.

Nonetheless, the State argued in the courts below that once the State's inverse condemnation proceedings were unsuccessfully concluded, Mr. Guetersloh's present claim for just compensation under the Fifth Amendment was barred by ordinary rules of res judicata. Under the approach suggested by the State, once a property owner's Fifth Amendment claim is perfected, it would also be precluded.

Properly understood, the present claim for an uncompensated Fifth Amendment taking constitutes a separate and distinct cause of action from that litigated previously. *Lake Lucerne*, 878 F.2d at 1370. To hold that Mr. Guetersloh forfeited his right to just compensation because he did not assert that claim before it existed, would subordinate this basic constitutional right to a wholly unwarranted concept of res judicata.

As construed by state and federal appellate courts, the primary issue addressed by this ripeness doctrine is when a party may properly assert a cause of action. *See, e.g., Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244 (Tex. App.--Dallas 1994, writ granted); *see also, Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir.1992). Its purpose is to avoid premature adjudication and to prevent courts from becoming entangled in abstract disagreements over administrative policies, and protects administrative agencies from judicial interference until they have formalized their administrative decision and the challenging parties are able to feel the effects of that decision in a concrete way. *See, City of El Paso v. Madero*, 803 S.W.2d 396, 398-99 (Tex. App.--El Paso 1991, writ denied), *cert. denied*, 502 U.S. 1073 (1992). More importantly, however, ripeness involves the issue of subject matter jurisdiction, and the power of a court to render particular relief. *Id.*, at 399. As the Texas courts have

made clear, the same standards addressed by this Court in *Williamson County* apply in the state courts as well. *Town of Sunnyvale*, 905 S.W.2d at 245-48.

No one contends that the receivership made the subject of this proceeding was initially unnecessary or improper. What is complained of is that Mr. Guetersloh was singled out to bear a public burden that rightfully should have not been borne by him, alone. Petitioner concedes that as a fundamental attribute of sovereignty, states may exercise their police power to "take" private property where it is deemed beneficial to the public interest. However, the obligation of government to pay just compensation for what it takes is a "condition placed on the otherwise rightful exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

As a result, federal takings law recognizes that under certain circumstances, a statute or regulation may meet the standards necessary for a valid exercise of the police powers, and nonetheless constitute a taking. *Lake Lucerne*, at 1371; *see also*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *First English v. County of Los Angeles*, 482 U.S. at 316-20. Even regulations that are rationally related to a legitimate state interest may nonetheless violate the "takings" provision of the Fifth Amendment. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1013-15 (1992). Where, as here, a taking is alleged from regulations which deprive property of all value, the test is whether the deprivation is contrary to reasonable, investment-backed expectations. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

Under this Fifth Amendment standard, otherwise valid laws may constitutionally obligate state or local governments to compensate property owners. Stated another way, the standards necessary for the proper exercise of the police power may be met, but nevertheless result in a compensable taking under the Fifth Amendment.

In Guetersloh I it was determined that under Texas law, regulatory takings focus solely on the reasonableness of the regulation at issue. *See*, Slip Op. at p. 7. Under the relevant Fifth Amendment standard, once it is determined that the offending regulation substantially advances a legitimate state interest, the inquiry then focuses on whether that regulation denies an owner of economically viable use of that property. *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Lucas*, 505 U.S. at 1030-31. Unlike Texas law, the Fifth Amendment requires that:

> [A] regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, [and] compensation must be paid to sustain it.

*Lucas*, 505 U.S. at 1030. Thus, the applicable standards for compensating property owners under the Fifth Amendment and under the Texas Constitution are quite different.

At oral argument before the court of appeals, the City of Lubbock candidly admitted that the present claim would not be barred by res judicata if asserted against them in federal court. Yet traditional rules of preclusion are generally applicable in the cross-forum context. State judicial proceedings are due the same credit in a federal court that they are entitled to by law or usage in the courts of the rendering state. 28 U.S.C. §1738; *see also*, *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 80-81 (1984). Accordingly, a federal court must give a state-court judgment the same preclusive effect that it would have under the law of the state in which the judgment was rendered, even when, as here, the basis of the federal claim is the Civil Rights Act. *Migra*, 465 U.S. at 81, 83-84. If res judicata does not bar this claim in federal court, the claim should be available in state court, as well.

**Could Have Been Brought?**

The question of when a federal cause of action is complete so that it may be enforced by a lawsuit, and thus has accrued, is a federal question. *Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). Under *Williamson County*, Fifth Amendment takings claims are supplemental to a state takings claim, and may not be brought until the property owner has unsuccessfully sought compensation under state remedies. *Williamson County*, 473 U.S. at 194-95. Consequently, the original state suit cannot be the same transaction for res judicata purposes because the exhaustion of the state court appeal in Guetersloh I is the second element of the federal cause of action. That element only arises at the conclusion of the state court proceeding. *City of Grand Prairie v. Sisters of Holy Family of Nazareth*, 868 S.W.2d 835, 844 (Tex. App., - Dallas 1993, writ denied), *cert. denied*, 513 U.S. 909 (1994); *see also Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (5th Cir. 1982).

Nonetheless, the Texas courts have concluded that Fifth Amendment taking claims are the type of "alternative" or "contingent" claims that must be brought under TEXAS RULES OF CIVIL PROCEDURE 48 and 51(b) *before* the second required element has occurred, in order to avoid the preclusive effect of res judicata. Tex. R. Civ. P. 48 and 51(b). Under the "transactional" approach to res judicata adopted in Texas, a claim is precluded "if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit." *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex.,1992). For purposes of this standard, the dispositive question becomes whether, given the "special nature" of the Fifth Amendment's Takings Clause, Petitioner's federal-law and state-law claims are truly separate and distinct, or are merely two alternative theories by which recovery is sought for the same alleged taking.

Although conceding that at least facially, Petitioner's argument sounds appealing, the Austin Court found that the Texas Rules of Civil Procedure expressly provide for the simultaneous presentation of multiple claims, alternative theories, and contingent causes of action. According to these rules of procedure, the mere fact that a cause of action is contingent on the outcome of another suit does not prevent the two claims from being raised and litigated simultaneously in the same suit.

Relying on *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794 (Tex.,1992), which concerned a contract action for indemnity, the court found that under Rule 51(b) of the Texas Rules of Civil Procedure, claims for just compensation asserted under the Fifth Amendment represent the kind of contingent claims that must be asserted under Texas procedural law in order to escape the bar of *res judicata*. *Guetersloh v. State*, 930 S.W.2d 284, 287-88 (Tex. App.-- Austin 1996, writ denied).

However, claims for just compensation under the Fifth Amendment are not at all "like" contract actions for indemnity brought against an insurance company. At the time of suit, facts which give rise to such contract actions have already occurred. In the context of these Fifth Amendment claims, however, an unsuccessful conclusion of state compensation remedies is a necessary element of the claim, itself. Carried to its logical conclusion, property owners who seek to avoid the bar of res judicata would be required, under this rule, to actually sue the state for money damages on the mere presumption that the state will somehow act unconstitutionally toward them at some future, but unknown date. Setting aside the fact that states are not only presumed, but are actually compelled to act in a constitutional manner, it would be difficult to envision a scenario in which a property owner could ever actually prevail in such a proceeding.

It has long been the rule that "a claim is not barred until it comes into being and can be appropriately asserted." *Empire Trust*

*Co. v. United States*, 324 F.2d 507, 508 (5th Cir. 1963), *quoting Martin v. Brodrick*, 177 F.2d 886, 888 (10th Cir. 1949). Furthermore, a judgment in one cause of action does not bar a second cause of action which is based upon new facts created by the first judgment. The fact that both actions arise out of the same subject matter is immaterial. *Id.* With all due deference to the reasoning of the Texas courts, it is difficult to discern how it could be that takings claims under the Fifth and Fourteenth Amendments must be brought as an alternative or contingent claim under Texas procedure, even though the claim is not "ripe" under federal law and no constitutional violation occurs until the property owner has unsuccessfully pursued State compensation procedures. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

The ripeness holding of *Williamson County,* which requires exhaustion of the state court suit first, is analogous to holdings on when a cause of action accrues for limitations purposes. In suits for wrongful deprivations of property under 42 U.S.C. §1983, the same considerations that render a claim premature prevent accrual of that claim for limitations purposes. Those claims do not accrue until the relevant governmental authorities have made a final decision on the fate of the property involved. *Norco Construction Co., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986). At bottom, this is not the kind of contingent claim that is contemplated under Rules 51 and 48 of the Texas Rules of Civil Procedure.

Whether Petitioner's Fifth Amendment rights were violated presents a different legal inquiry than that litigated previously. He was entitled, and indeed was required, to utilize available state compensation remedies before asserting a violation of the Just Compensation Clause. Substantially different questions are raised in these proceedings, and res judicata simply does not apply. *See, e.g., Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d at 1368.

## The *Jennings* Reservation

Petitioner respectfully submits that the Court of Appeals also erred in relying on *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992), to conclude that Mr. Guetersloh should have made a "*Jennings* reservation" to preserve his federal claim for federal court. Preserving the availability of a federal forum for a federal question is just one factor in the federal res judicata analysis of whether to grant preclusive effect to a state court judgment. The purpose of a *Jennings* reservation is to place the trial court on notice of a party's intention to reserve his right to litigate federal questions in a federal forum. *Holmes v. Jones*, 738 F.2d 711, 714 (5th Cir. 1984). Under the circumstances of this case, however, a *Jennings* reservation fails of its intended purpose because of the Eleventh Amendment. The Court of Appeals notes as much in its Opinion. 930 S.W.2d at 287.

Under his federal appeal, to which this Court previously denied certiorari, it was determined that Mr. Guetersloh never had any right to a federal forum because of the Eleventh Amendment bar. A *Jennings* reservation would therefore not be applicable under the facts of this case. Requiring a *Jennings* reservation, under these circumstances, would only serve to further create a federal and state procedural morass and insure that this Petitioner never gets his day in court, in *any* forum, on his federal constitutional claim.

The Court of Appeals further erred in applying the *Fields* case retroactively to Mr. Guetersloh. *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976), was not a takings case. Moreover, the *Fields* decision applying a *Jennings* reservation requirement to a Fifth Amendment takings case was rendered *after* the Texas Supreme Court had denied writ on the appeal of Guetersloh I. Petitioner could not have reasonably anticipated in 1985 what the *Fields* court itself admits is a strained analysis. Nor could Mr. Guetersloh have reasonably anticipated that he was supposed to

make such a *Jennings* reservation to preserve a federal claim which he could not present in federal court anyway. Petitioner certainly had no clue that he needed to make a *Jennings* reservation to avoid a procedural bar that was created after the fact. In short, retroactively applying *Jennings* and *Fields* in this way simply creates a trap for the petitioner which is totally unnecessary.

Furthermore, the *Fields* decision itself is rare because the court admits that it has engaged in strained reasoning in order to avoid overruling *Jennings*, which it suggests should no longer be good law. Applying the *Fields* opinion to Guetersloh raises the very dilemma that the Eleventh Circuit panel states as its basis for questioning the *Jennings* reservation:

> [I]t would be a very odd result if the federal courts were effectively barred from hearing claims arising under the takings clause, except through Supreme Court review via the writ of certiorari, of state court decisions interpreting the clause. The real question is not whether the state courts are unable to enforce the takings clause -- they most assuredly are -- rather, the question is whether the citizens of this country are to be barred from ever vindicating a federal constitutional right through the federal court system. This premise seems to go beyond *Allen* [*v. McCurry*, 449 U.S. 90 (1980)] and *Migra* [*v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984)] and is at present foreclosed in this Circuit by operation of Jennings. Thus, our concern about the wisdom of Jennings relates to the Jennings Court's ostensible reliance on *England* to reach its result, not to the result itself. Although the result in Jennings seems to us to be a reasonable one, we are doubtful that

> *England* [*v. Louisiana State Bd. of Med. Examiners.*, 375 U.S. 411 (1964)] compels it.

*Fields*, 953 F.2d at 1307 n.8 (citations added).

Finally, applying *Fields* to Petitioner results in circular reasoning. As explained by the Fifth Circuit, there was nothing to reserve because the Fifth Amendment cause of action does not exist and therefore does not accrue until the constitutional violation occurs (i.e., until all state compensation procedures prove ineffective). *Samaad v. City of Dallas*, 940 F.2d 925, 935 (5th Cir.1991). As the *Fields* court itself notes, in *Lewis v. East Feliciana Parish School Bd.*, 820 F.2d 143, 146 n.1 (5th Cir. 1987), a panel of the Fifth Circuit has "severely questioned the continuing validity of Jennings." *Fields*, 953 F.2d at 1305 n.4. Neither *Jennings*, nor *Fields* should be applied in such a way as to deny this appellant a day in court on his federal takings claim.

**Even If Compelled By State Procedural Law, The Judgment Rendered In Guetersloh I Results In A Denial of Due Process, And Is Not Entitled To Preclusive Effect.**

Even if this claim could have been asserted as an alternative or contingent claim under the Texas Rules of Civil Procedure, the doctrine of res judicata should not be applied, under these circumstances, to preclude Mr. Guetersloh from asserting his right to "just compensation" under the Fifth and Fourteenth Amendments. Apparently, the Texas courts concluded, incorrectly, that "Guetersloh bases his argument against the application of res judicata entirely on his interpretation of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)." *Guetersloh*, 930 S.W.2d at 287. To the contrary, a substantial body of state and federal jurisprudence would allow recovery under circumstances where, as here, a state has impermissibly interpreted its own laws to deny a minimum level of protection afforded by the federal constitution.

State constitutions cannot subtract from the rights guaranteed by the United States Constitution. *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). At least as interpreted by the Texas courts, "the only limit on the states is that, in relying on their constitutions, they may not deny individuals the minimum level of protection mandated by the Federal Constitution." *Davenport v. Garcia*, 834 S.W.2d 4, 15 (Tex. 1992); *see also, Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983). "This approach has been referred to as a 'federal safety net,' ensuring that individuals receive all available guarantees of their rights." *Davenport*, 834 S.W.2d at 15. Such a "constitutional safety net" would be meaningless, however, if litigants have no right to actually pursue their federal remedies once it is determined that a judgment entered according to state law denies relief that is compelled by the federal constitution.

A recurring theme in this litigation is that Texas courts are open to both statutory and inverse condemnation claims brought against agencies of the state on the basis of the Fifth and Fourteenth Amendments, as well as on the basis of the Texas Constitution and laws. In fulfilling that obligation, however, states must satisfy all applicable requirements of the Due Process Clause. *Kremer v. Chemical Const.Corp.*, 456 U.S. 461, 482 (1982). Where they do not, it is well established that a "state may not grant preclusive effect in its own courts to a constitutionally infirm judgment...." *Id.*

**The Summary Judgment Standard**

This case comes to the Court by way of summary judgment. Under the well-established rules of summary judgment practice, evidence favorable to this Petitioner should be taken as true, and every reasonable inference must be indulged in his favor. *Nixon v. Mr. Property Management Co.*, 675 S.W.2d 585 (Tex. 1984)(applying Texas law); *see also, Hudson v. Palmer*, 468 U.S.

517, 540 (1984)(applying the federal rules). For purposes of this appeal, it should be conceded that Mr. Guetersloh has established a *prima facia* case for an uncompensated "taking" within the meaning of the Fifth and Fourteenth Amendments.

Applying res judicata principles to the holding of Guetersloh, I would entitle this property owner to no compensation, whatsoever, for what amounts to a taking, as a matter of law. Such a judgment is entitled to preclusive effect only if it comports with due process. If it does not, it is well-established that federal courts can refuse to accord preclusive effect to a state court judgment where application of that state's preclusion law would violate due process. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3rd Cir. 1989); *citing Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982).

**Due Process Requires Just Compensation**

The requirement of "just compensation" for the taking of private property is constitutionally required under the Fifth Amendment, and for almost a century, has been held to be applicable to the states because of its incorporation into the meaning of "due process" as found in the Fourteenth Amendment. *Chicago, Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226, 236 (1897); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987). Questions going to "property," "taking," "just compensation," and "payment" are all facets of this central federal question of denial of due process. *Foster v. City of Detroit*, 254 F.Supp 655, n.14 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

The ultimate question to be resolved in these proceedings is not merely whether the procedure by which Mr. Guetersloh's property was "taken" complied with the requirements of procedural due process. Rather, the issue is whether the state, although complying with its own rules of procedure, has nevertheless violated the Fifth and Fourteenth Amendments by

taking this man's property without just compensation. As Mr. Justice Harlan stated for the Court in the seminal case of *Chicago, Burlington & Quincy R.R. v. City of Chicago*:

> A state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form.

*Chicago, Burlington & Quincy R.R.*, 166 U.S. at 234.

Under such circumstances, it has long been recognized that there is the possibility of a federal question in every taking under state authority, even if all conditions of state law have been complied with. *See McCoy v. Union Elevated Ry.*, 247 U.S. 354 (1918); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Chicago Burlington and Quincy R.R.*, 166 U.S. at 236 (1897); *Foster v. City of Detroit*, 254 F.Supp. 655, n.14; *Richmond Elks Hall Ass'n v. Richmond Dev.*, 561 F.2d 1327, 1330 (9th Cir. 1977); 18 AM. JUR. *Eminent Domain* §§ 144, 145 pp. 772-3 (1938). Zero compensation, under these circumstances, would sanction the taking of private property without due process.

> The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation... The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law,

> if the necessary result be to deprive him of his property without compensation.

*Chicago, Burlington & Quincy R.R.*, 166 U.S. at 236-37. The decision rendered in Guetersloh I did not compensate this litigant for a Fifth Amendment "taking." Because that judgment would offend due process, it is not entitled to preclusive effect.

In Guetersloh I, the issue before the court was whether a compensable event occurred under state law. The answer was "no." The issue in the present case is whether the state can enforce a policy that is so inconsistent with the "just compensation" mandate of the Fifth and Fourteenth Amendments. In Guetersloh I, the Texas Courts held that "the Commission's authority to *seek* a receivership against this utility was a valid exercise of the state's police power, for which no compensation is required." Slip Op. at p. 7(Guetersloh I)(emphasis added). Under the federal standard, however,

> The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034, (1992) (Kennedy, J., concurring).

Guetersloh I demonstrates that under Texas law, regulatory takings focus solely on the reasonableness of the regulation at issue. *See*, Slip Op. at p. 7 (Guetersloh I). Yet under the federal constitutional standard, once it is determined that the offending regulation substantially advances a legitimate state interest, the inquiry then focuses on whether that regulation denies an owner of economically viable use of his property. *Nollan v.*

*California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Lucas*, 505 U. S. at 1030. Unlike the analysis of Texas law in Guetersloh I, the Fifth Amendment requires that:

> [A] regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, [and] compensation must be paid to sustain it.

Lucas, 505 U.S. at 1030. As he was required to do under the plain language of *Williamson County*, Petitioner first utilized the procedure prescribed by Texas law to assert his inverse condemnation claim before asserting a violation of the Just Compensation Clause. *See, e.g., Williamson County*, 473 U.S. at 194. When tested against the requirements of the Fifth Amendment, the judgment in Guetersloh I results in a denial of due process, and effects an unconstitutional taking of property without just compensation. In the event of such an uncompensated taking, the federal right to just compensation becomes not only a defense to the state law action, but also becomes an independent claim that is both necessary and proper. *Cf. Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971); *Boilermakers v. Hardeman*, 401 U.S. 233, 241 (1971).

As this Court has previously held, the Property Clause of the Fifth Amendment "constitutes more than a pleading requirement, and compliance with it [requires] more than an exercise in cleverness and imagination." *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1986). Under these circumstances, the prior judgment in Guetersloh I is not entitled to preclusive effect, and res judicata should not apply.

To date, the merits of Mr. Guetersloh's claim for just compensation under the Fifth Amendment have not been addressed. Perhaps the most that can be stated with authority regarding the matter is that state and federal appellate courts are

deeply divided, and internally inconsistent, in the way and manner in which property owners are allowed to assert those Fifth Amendment rights. What is certain, however, is that in regulating the health, safety, and general welfare of its citizens, states may not simply transform private property into public property without compensation.

Nothing inherent in the private property rights of Mr. Guetersloh, as a lienholder, suggests that he is somehow undeserving of this constitutional protection. To the contrary, this Court as well as the Texas courts have expressly held otherwise. *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994), *citing Armstrong v. United States*, 364 U.S. 40, 48 (1960)("total destruction by the Government of all value of [certain] liens" is a taking). Nonetheless, Mr. Guetersloh has received nothing for the extended period during which his taking was effective.

This Petitioner unsuccessfully utilized state and federal compensation procedures. Now, having satisfied all known conditions precedent for this Fifth Amendment action, his constitutional claim is finally ripe, but is procedurally barred. Quite obviously, this is not the place or the time to reach the merits of Petitioner's entitlement to compensation under the Fifth Amendment. That is for the lower courts to determine upon a full and complete development of the record on remand. However, if the Petition is granted, this Court may wish to use this opportunity to revisit its *Williamson County* ripeness holding for the purpose of clarifying the question of when, and under what circumstances, such Fifth Amendment claims should properly be asserted. It may be that the Court would wish to somewhat distance itself from its prior position by holding that ripeness, in this context, is not an unwaivable element of subject matter jurisdiction, but merely serves as a prudential limitation imposed upon federal, but not state courts. Or the Court may wish to confirm this ripeness standard and perhaps constitutionalize the rule of res judicata in

this context, so that the outcome of property owners' claims will no longer depend upon the vagaries of state procedural law.

Whatever is finally determined, Petitioner respectfully requests that the Court apply its decision prospectively, and order that this cause be remanded for a more constitutionally defensible analysis of the just compensation rights afforded to Mr. Guetersloh by the Fifth and Fourteenth Amendments.

## CONCLUSION

For all of the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioner to file his brief so that he may articulate, more comprehensively, why the Texas Courts failed to properly analyze the federal constitutional principles involved when it imposed the bar of *res judicata* to deny this property owner an opportunity in which to litigate the merits of this uncompensated regulatory taking. If this published decision goes unreviewed, it will mean that property owners who are forced to endure such uncompensated takings at the hands of a state, and who faithfully follow the dictates of this Court to ripen those claims, will find that their promise of Just Compensation under the Fifth and Fourteenth Amendments has been converted to a mere illusion.

Respectfully Submitted,

JAMES DOUGLAS RAY
ATTORNEY FOR THE PETITIONER
406 W. 13th Street, Suite 200
Austin, Texas 78701
(Tel.) 512/478-8698
(Fax.) 512/478-2778

DECEMBER 3, 1997

## APPENDIX

*Appendix "A"*

**M.F. GUETERSLOH, Jr., Appellant,**

**v.**

**The STATE OF TEXAS, The Public Utility Commission, The Texas Water Commission, The City of Lubbock, and James Miller, Receiver of the Carlisle Water Supply Company, Appellees.**

No. 03-95-00626-CV.

Court of Appeals of Texas, Austin.

Sept. 18, 1996.

Rehearing Overruled Oct. 30, 1996.

Owner of water supply company brought action against state, Public Utility Commission (PUC), Texas Water Commission, city, and receiver of company, asserting takings claim under Fifth and Fourteenth Amendments. Defendants moved for summary judgment. The District Court, Travis County, 261st Judicial District, John Dietz, J., granted motion on res judicata grounds. Owner appealed. The Court of Appeals, Jones, J., held that: (1) owner's Fifth and Fourteenth Amendment takings claim could have been raised in owner's prior state-court inverse condemnation action and, thus, claim was barred by res judicata, despite contention that owner's federal takings claim had not yet accrued until disposition of his state-law constitutional takings claim in prior action, and (2) owner did not come within exception to res judicata for federal takings claims, as owner failed in prior action to make proper reservation of his federal-law claim for possible litigation and resolution by federal court.

Affirmed. 930 S.W.2d 284, Guetersloh v. State, (Tex. App.-Austin 1996)

Marilyn Phelan, Lubbock, for Appellant. Jeff Hartsell, City of Lubbock, Office of the City Attorney, Lubbock, Dan Morales, Attorney General, James Todd, Assistant Attorney General, General Litigation Division, Austin, for Appellees.

Before POWERS, JONES and B.A. SMITH, JJ.

JONES, Justice.

Appellant, M.F. Guetersloh, Jr., sued the State of Texas, the Public Utility Commission, the Texas Water Commission, (FN1) the City of Lubbock, and James Miller, Receiver of the Carlisle Water Supply Company, appellees, asserting a takings claim under the Fifth and Fourteenth Amendments to the United States Constitution. The district court granted summary judgment against Guetersloh on the ground that his federal takings claim was barred by res judicata because the claim could have been brought in his prior inverse-condemnation suit. In a single point of error, Guetersloh asserts that his federal takings claim was not ripe until his earlier suit was concluded, so he could not have brought the federal claim in the prior suit. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Guetersloh was previously the owner and operator of the Carlisle Water Supply Company, a small water utility that supplied water to a handful of families in the Carlisle community outside of Lubbock. In 1978 Guetersloh sold the utility, retaining a vendor's lien and deed of trust on the property as security for a promissory note. In 1983 the new owner allegedly violated an order of the Public Utility Commission, resulting in the appointment of a receiver to manage the utility's assets. During the receivership, the owner defaulted on his payments to Guetersloh, who foreclosed on the utility in 1985. The State,

however, judicially enjoined Guetersloh from entering the property or interfering with the receiver's right of legal possession.

In 1987 the City of Lubbock annexed the Carlisle area and built a new water system, continuing the receivership of Guetersloh's utility until the new water system was completed and began providing water services to all the residents of Carlisle. After the customers of Carlisle Water Supply were transferred to the City of Lubbock, Guetersloh was granted permission to take possession of the utility. By that time, however, all the utility's customers were gone and its pipes and workings were badly in need of repair. At no time did the State pay Guetersloh for any use of or injury to the utility.

During the time the receiver was operating the utility, Guetersloh filed an inverse-condemnation claim against the City of Lubbock and the receiver in Lubbock County district court, initially asserting causes of action under the takings clauses of both the Texas Constitution (FN2) ("the state-law claim") and the United States Constitution (FN3) ("the federal-law claim"). The State of Texas, on behalf of the Public Utility Commission, intervened in the suit. Guetersloh later added the Texas Water Commission as a defendant. Without comment or explanation, Guetersloh subsequently dropped the federal-law claim from his suit, leaving only the state-law claim. The district court in Lubbock County granted an interlocutory summary judgment in favor of all defendants except the Public Utility Commission. The court then transferred venue in the case to Travis County. The district court in Travis County later rendered a final summary judgment in favor of the Public Utility Commission; this had the effect of making the interlocutory summary judgment in favor of the other defendants final also.

Guetersloh appealed the trial court's judgment rejecting his state-law claim. This Court affirmed, reasoning that the alleged taking was a valid exercise of state police power, for which no compensation is required. Guetersloh v. Public Util.

Comm'n, No. 3-90-161-CV (Tex.App.-Austin Aug. 14, 1991, writ denied) (not designated for publication). Guetersloh's application for writ of error to the Texas Supreme Court was denied.

Guetersloh then filed suit on his federal-law claim in federal district court. Named as defendants, among others, were the State of Texas, the Public Utility Commission, the Texas Water Commission, and the receiver. The district court dismissed the claim, ruling that it was barred by the statute of limitations, res judicata, and the Eleventh Amendment to the U.S. Constitution. The Fifth Circuit Court of Appeals modified the judgment to hold that Guetersloh's claim was barred solely by the Eleventh Amendment. Guetersloh v. State of Texas, No. 93-8729, 25 F.3d 1044 (5th Cir. June 3, 1994) (not designated for publication), cert. denied, 513 U.S. 1076, 115 S.Ct. 721, 130 L.Ed.2d 627 (1995). The U.S. Supreme Court denied Guetersloh's application for a writ of certiorari.

Guetersloh then filed the present suit in Travis County district court, reurging his federal-law claim. The court granted appellees' motion for summary judgment, ruling that Guetersloh's federal-law claim was barred by res judicata. It is from this judgment that Guetersloh now appeals.

DISCUSSION

[1] [2] Under the "transactional" approach to res judicata adopted in Texas, a claim is precluded "if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit." Barr v. Resolution Trust Corp., 837 S.W.2d 627, 631 (Tex.1992). In the present case, Guetersloh's federal-law and state-law claims are simply two alternative theories by which he attempts to recover for the same alleged taking, so there is no issue of whether the two claims arose out of the same factual transaction. Thus, the dispositive issue here is whether Guetersloh's federal-law claim

could have been litigated in the prior suit in which he pursued his state-law claim to a final judgment.

Guetersloh bases his argument against the application of res judicata entirely on his interpretation of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), where the United States Supreme Court held that "if a State provides an adequate procedure for seeking just compensation [for a taking], the property owner cannot claim a violation of the [federal] Just Compensation Clause until it has used the [state] procedure and been denied just compensation." Id. at 195, 105 S.Ct. at 3121. He asserts that he was precluded from asserting his federal-law claim in his first suit because, under the holding of Williamson County, that claim was not yet ripe. Guetersloh argues that he was required to unsuccessfully seek compensation in the state courts under Article I section 17 of the Texas Constitution before his federal-law claim even existed; that only upon denial of just compensation from the state was his federal-law claim mature; and that therefore the nonexistent, unripe federal claim could not have been litigated in his state inverse-condemnation suit. In Guetersloh's view, if he were now precluded by res judicata from bringing his federal-law claim, the effect would be to deny him altogether a forum in which to argue the merits of his Fifth Amendment takings claim.

[3] Facially, Guetersloh's arguments sound appealing. The Supreme Court in Williamson County held that a plaintiff seeking to assert a federal takings claim under the Fifth Amendment must first have unsuccessfully sought compensation through the state procedures for doing so. 473 U.S. at 194, 105 S.Ct. at 3120. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Id. In the present case, Guetersloh contends that this requirement was not and could not be met until he pursued his state-law claim in the state courts and was denied relief. Thus, Guetersloh argues that his

federal-law claim was not ripe for determination by the state court at that time, could not have been brought with his state claim, and, therefore, could not be subject to res judicata. We disagree.

[4] First, state courts clearly have jurisdiction to resolve takings claims based on federal law. Moreover, the Texas Rules of Civil Procedure expressly provide for the simultaneous presentation of multiple claims, alternative theories, and contingent causes of action:

RULE 48. ALTERNATIVE CLAIMS FOR RELIEF

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses....

RULE 51. JOINDER OF CLAIMS AND REMEDIES

(a) Joinder of Claims. The plaintiff in his petition ... may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party....

(b) Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive right of the parties....

Tex. R. Civ. P. 48, 51.

[5] Thus, with limited exceptions not applicable here, under Texas law the mere fact that a cause of action is contingent on the outcome of another suit does not prevent the two claims from being raised and litigated simultaneously in the same suit. For example, in Getty Oil Co. v. Insurance Co. of North America, 845 S.W.2d 794 (Tex.1992), Getty Oil purchased chemicals from NL Industries, Inc. under a contract that arguably required NL to obtain insurance on Getty's behalf. An accident involving the

chemicals occurred. After the parties litigated various liability issues favorably to NL, Getty sued NL for insurance coverage. Getty sought to avoid a res judicata bar by arguing that its insurance claims against NL did not accrue until judgment in the first suit was rendered resolving the liability issues. Relying on rule 51(b), the supreme court rejected this argument:

> Getty argues that res judicata cannot bar its present claims against NL because these claims did not accrue until judgment was rendered in the [Getty Oil Corp. v.] Duncan [721 S.W.2d 475 (Tex. App--Corpus Christi 1986)] suit. That is, Getty had no liability and hence no need for insurance coverage until liability was assigned. The contingent nature of these claims, however, does not preclude the operation of res judicata. We held in Barr that "[a] subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which, through the exercise of diligence, could have been litigated in a prior suit." 837 S.W.2d at 631. Getty could have asserted its present claims in the Duncan suit, with their resolution being contingent on the plaintiffs' claims.
>
> Id. at 799.

Likewise, in the present case, Guetersloh's federal-law claim was contingent on an unsuccessful outcome in his state-court suit involving his state-law claim. Under rules 51 and 48 of the Texas Rules of Civil Procedure and the supreme court's holding in Getty Oil, nothing prevented Guetersloh from simultaneously raising his federal-law and state-law claims in the same suit. Accordingly, his "not yet accrued" argument does not provide him an escape from the bar of res judicata.

[6] Nonetheless, Guetersloh also contends that he has a right to litigate his federal-law claim in federal court. He argues that, since federal courts will not relitigate a federal-law issue that has already been tried in state court, a procedure whereby he is required to present both his state-law and his federal-law claims

initially in state court would effectively preclude him from ever having his federal-law claim decided by a federal court.

[7] [8] [9] Leaving aside the question of the Eleventh Amendment, a plaintiff generally has the right to have his federal-law claim litigated in a federal court. The United States Supreme Court has recognized "the primacy of the federal judiciary in deciding questions of federal law." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16, 84 S.Ct. 461, 465, 11 L.Ed.2d 440 (1964). In the present case, however, Guetersloh did not avail himself of the procedure by which he could have preserved his federal-law claim while proceeding to litigate his state-law claim in state court. In England, an abstention case, the Supreme Court set forth a procedure by which would-be federal-law claimants may litigate their state-law claims and still return to federal district court on their federal-law claims if the results in state court are unfavorable. The court held that, following federal-court abstention, a plaintiff is not required to litigate his federal claims in the state court; he has only to inform the state court what his federal claims are, so that the state statute or requirement can be construed "in light of" those claims. Id. at 420, 84 S.Ct. at 467. This "reservation" by the would-be federal claimant was held to occur in three steps: (1) the litigant first files in federal court; (2) the federal court abstains and stays the federal proceedings until the state courts resolve all state-law questions; and (3) the litigant informs the state courts of his intention to return, if necessary, to federal court on his federal constitutional questions after the state-court proceedings are concluded. Id. at 416-22, 84 S.Ct. at 465-68. When a proper reservation has been made, the litigant's right to return to the federal courts must in all events be preserved. Id. at 421-22, 84 S.Ct. at 468. However, if a party is found to have freely sought a binding adjudication of all his claims in state court, and he has failed to make a proper reservation to the disposition of the entire case by the state courts, then that party

has in effect foregone his right to return to federal court to bring his federal claim. Id. at 419, 84 S.Ct. at 467.

The Fifth Circuit applied the England procedural requirements broadly in Jennings v. Caddo Parish School Board, 531 F.2d 1331 (5th Cir.1976). Although not an abstention case, the court held that "had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts." Id. at 1332.

Although England and Jennings were in the contexts of medical licensees and racial discrimination, respectively, the Eleventh Circuit's decision in Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir.1992), is squarely on point. Fields resolves the question of how Williamson County and England work together in the context of a takings case. Fields points out that the three-step England process is not applicable to a takings clause claim, because Williamson County ripeness requirements effectively prevent a litigant from first filing in a federal court. Fields, 953 F.2d at 1305. The Fields court held, however, that a " Jennings reservation" (i.e., a reservation not preceded by federal court abstention) can be made only if the would-be federal court litigant is pursuing state-court proceedings "involuntarily." Id. at 1306 (construing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)). The court held that a litigant is "involuntarily" in state court if one of two prerequisites is met: (1) the litigant is a defendant in a non-removable state-court action and wishes to pursue a federal counterclaim, or (2) federal law imposes an exhaustion requirement upon a would-be federal court litigant as a precondition of bringing his federal claim in federal court. 953 F.2d at 1306. By operation of Williamson County, federal takings claims satisfy the second prerequisite. Id. Hence, the Fields court held that, if the appropriate reservation is made in state court, would-be federal court litigants who are forced to

pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are "involuntarily" in state courts, and therefore qualify for the exception to generally applicable res judicata principles.

Id.

In the present case, Guetersloh was involuntarily in state court, because he was fulfilling the Williamson County requirements. However, the record does not show that he made or attempted to make any reservation of his federal-law claim through the procedures outlined above. Thus, although he could, with the exercise of diligence, have preserved his right to return to federal court to litigate his federal-law claim, he did not do so.

CONCLUSION

We conclude that Guetersloh's federal-law claim could have been raised in his first state-court suit, thus making res judicata principles applicable. We also conclude that Guetersloh does not come within an exception to res judicata, because he failed to make a proper reservation of his federal-law claim for possible litigation in and resolution by a federal court. We overrule Guetersloh's point of error and affirm the trial court's judgment.

FN1. The Texas Water Commission has since been converted into the Texas Natural Resource Conservation Commission. See Act of July 30, 1991, 72d Leg., 1st C.S., ch. 3, § 1.085, 1991 Tex. Gen. Laws 4, 42.

FN2. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Tex. Const. art. I, § 17.

FN3. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V.

*Appendix "B"*

**No. 95-07117**

| | | |
|---|---|---|
| **M. F. GUETERSLOH, JR.,** | § | **IN THE DISTRICT** |
| | § | **COURT** |
| **Plaintiff** | § | |
| | § | |
| **VS.** | § | |
| | § | |
| **THE STATE OF TEXAS;** | § | **OF TRAVIS COUNTY,** |
| | § | **TEXAS** |
| **THE PUBLIC UTILITIES** | § | |
| **COMMISSION; THE TEXAS** | § | |
| **WATER COMMISSION; THE** | § | |
| **CITY OF LUBBOCK AND** | § | |
| **JAMES MILLER, RECEIVER** | § | |
| **OF THE CARLISLE WATER** | § | |
| **SUPPLY COMPANY,** | § | |
| | § | **261st JUDICIAL** |
| **Defendants** | § | **DISTRICT** |

## ORDER GRANTING SUMMARY JUDGMENT

The Court, after examining the pleadings, briefs, and the Summary Judgment filed by the Defendants and Movants, THE STATE OF TEXAS, THE PUBLIC UTILITIES COMMISSION, THE TEXAS WATER COMMISSION, THE CITY OF LUBBOCK, AND JAMES MILLER, is of the opinion that the Motions of Defendants well founded and should be GRANTED on the basis of res judicata.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiff, M. F. GUETERSLOH, JR., take nothing against the aforementioned Defendants.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendants, THE STATE OF TEXAS, THE PUBLIC UTILITIES COMMISSION, THE TEXAS WATER

COMMISSION, THE CITY OF LUBBOCK, AND JAMES MILLER, recover their costs herein, for which execution may issue.

All relief requested and not expressly granted is denied

SIGNED this 6th day of September, 1995.

Original signed by the Honorable
John K. Dietz, PRESIDING JUDGE

APPROVED AS TO FORM AND CONTENT:

Original signed by
Jeff Hartsell, Attorney for the City of Lubbock

Original signed by
James Todd, Attorney for the State of Texas,
The Public Utilities Commission, The Texas
Water Commission, and James Miller

*Appendix "C"*

**No. 96-1257**

**IN THE SUPREME COURT OF TEXAS**

**M. F. GUETERSLOH, JR.**
**v.**

**THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; THE CITY OF LUBBOCK; and JAMES MILLER, receiver of the CARLISLE WATER SUPPLY COMPANY**

July 31, 1997

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by _____
Original signed by
Michael C. Murphey, Deputy

*Appendix "D"*

**No. 96-1257**

**IN THE SUPREME COURT OF TEXAS**

**M. F. GUETERSLOH, JR.**

**v.**

**THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; THE CITY OF LUBBOCK; and JAMES MILLER, receiver of the CARLISLE WATER SUPPLY COMPANY**

September 4, 1997

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by _____
Original signed by
Blanca E. Morin, Deputy

*Appendix "E"*

**NO. 93-8729**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**M. F. GUETERSLOH, JR.,**
**Plaintiff-Appellant,**

**V.**

**STATE OF TEXAS, ET AL,**
**Defendant-Appellee.**

**Appeal from the United States**
**District Court for the Western**
**District of Texas**

Before GARWOOD, JOLLY and SMITH, Circuit Judges**

PER CURIAM:

This is an inverse condemnation suit for money damages only brought by Plaintiff-Appellant, M. F. Guetersloh, Jr., (Guetersloh) in the court below against the State of Texas and certain of its agencies and officers in their official capacities under 42 U.S.C. § 1983 and the takings clause of the Fifth Amendment, as extended to the states by the Fourteenth

---

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Amendment.[1] Guetersloh claimed a temporary taking during and by virtue of a receivership, which had terminated prior to the judgment below, of a water company on the assets of which he had a lien which he had foreclosed before the receivership ended. Although defendants raised the Eleventh Amendment as a jurisdictional bar to this federal court suit, and the court below found that the suit was barred by the Eleventh Amendment, it nevertheless reached the merits and found Guetersloh's claims barred by limitations and res judicata, that there was no compensable taking, and that no damages were proved; and accordingly it dismissed the suit.

It is settled that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against a state or any state agency or state officer in his official capacity, and that any abrogation or waiver of such bar must be express and unequivocal. Quern v. Jordan, 99 S.Ct. 1139, 1146 (1979); Penhurst State Sch. & Hosp. v. Halderman, 104 S.Ct. 900, 907-8 (1984); Ford Motor Co. vs. Department of Treasury, 65 S.Ct. 347, 350 (1945). Waiver of sovereign immunity in state courts does not waive Eleventh Amendment immunity from suit in federal court. Penhurst at 907 n.9. Under the circumstances, it is clear that the instant suit should have been dismissed for want of jurisdiction under the Eleventh Amendment. See Barry v. Fordice, 814 F.Supp. 511 (S.D. Miss. 1992), aff'd on the basis of the district court opinion, 8 F.3d 1 (5th Cir. 1993); John G. & Marie Stella Kenedy Mem. Found. v. Mauro, No. 92-7714, slip op. 4415 (5th Cir. May 27, 1994); Harrison v. Hickel, 6 F.3d 1347 (9th Cir. 1993). We note in this connection that, as the State of

---

[1] To the extent that Guetersloh may have sought damages from any of the state officers in their individual capacities, he does not complain on appeal of the dismissal on the merits of any such claims; nor do we perceive any error in any such dismissal, as it is plain, inter alia, that any such claim would be defeated by qualified immunity.

Texas through its Attorney General confirms and as Guetersloh admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas constitution and laws. See, e. g., Estate of Scott v. Victoria County, 778 S.W.2d 585, 589-91 (Tex. App.-Corpus Christi 1989; n.w.h.) (Benavides, J.). In short, application of the Eleventh Amendment does not of itself deny a judicial forum, with ultimate review available in the United States Supreme Court, for resolution of Guetersloh's Fifth Amendment takings claim. Cf. Harrison at 1352-54.

We accordingly modify the judgment below so that the dismissal of Guetersloh's claims against the State of Texas, the state agencies, and the state officers in their official capacities is for want of jurisdiction under the Eleventh Amendment; and, as so modified, the judgment is affirmed.

MODIFIED and AFFIRMED AS MODIFIED.

*Appendix "F"*

**NO. A-92-CA-359**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**M. F. GUETERSLOH, JR.,**

**V.**

**THE STATE OF TEXAS, ET AL.**

**ORDER**

Comes now the Court and enters the following final Order in the above-styled cause of action.

**BACKGROUND**

The Court makes the following finding of facts:

In 1982, Plaintiff had a lienholder's interest in a privately owned rural water system near Lubbock, Texas. Plaintiff sold the water system to a Mr. Ray Nichols and retained a vendor's lien and deed of trust as security for the purchase price. The Defendant put on evidence that the water system was in poor condition at the time of the sale from Plaintiff to Mr. Nichols. After receiving complaints, the Public Utility Commission ("PUC") conducted an investigation into Nichols' alleged mismanagement of the system. The PUC entered an Order on October 22, 1982, directing Nichols to take certain steps and advising him that his failure to do so might result in the imposition of a receivership. Time passed, the violations continued, and the PUC obtained an Order from a Texas District Court on July 21, 1983, in The State of Texas v. Ray Nichols, d/b/a Carlisle Water Supply, Cause Number 343,820, in the 250th Judicial District of Travis County (the "receivership suit") naming

a receiver to take possession and operate the water service in compliance with appropriate health standards.[2] Defendant Miller, by the same Court Order, was appointed as the Receiver for the utility. Attorneys from the Attorney General's Office gave notice to the Plaintiff of various matters that were going on in the receivership proceedings. More time passed, and in 1985 the Plaintiff foreclosed and took legal title of the land. In December, 1985, the Plaintiff attempted to re-enter and take possession of the system, including physically removing one of the pumps from the plant, and the receiver obtained injunctive relief that prevented Plaintiff from having access onto the property. The application to vacate the receivership was filed on February 1, 1988. The Court entered an order vacating the receivership on March 25, 1988. The Plaintiff now has control of the water system.

Thus the Plaintiff had from 1985 through March, 1988, to intervene in the receivership case and assert any legal rights he had concerning the water supply system. The Plaintiff made a conscious decision not to intervene in the state receivership action. Instead, the Plaintiff filed a suit in the district court of Lubbock County, Texas, against the receiver, Miller, and the City of Lubbock (the "state suit"). In that state case, Plaintiff originally brought claims under both the state and federal constitutions alleging a "taking, damaging, or destroying . . . without adequate compensation." Plaintiff then amended his

---

[2] The summary judgment evidence establishes that the receivership lasted about five years, the last three of which occurred during the period of time that the Plaintiff claims to have had ownership of the property. Plaintiff did not intervene in the receivership, although he had the legal right to do so. The Plaintiff has no explanation for his failure to do so beyond his subjective belief that he would not have been successful. The Plaintiff's failure to intervene resulted in a forfeiture of his right to litigate within that forum his claims of waste and coliusion by the City of Lubbock as well as objecting to the final accounting and obtaining judicial review of the district court's oversight of the receiver.

pleadings to delete the claims under the U.S. Constitution. More time passed, and the state court terminated the receivership--without objection from the Plaintiff--and the final accounting was approved on April 5, 1988. The state district court soon thereafter granted the defendants' motion for summary judgment for all parties other than the PUC and transferred the case to Travis County, Texas. The state district court--in the absence of any evidence from the Plaintiff, even evidence of legal title to the water supply system--granted summary judgment for the PUC. The Plaintiff appealed these decisions through all of the state appellate courts, including the Texas Supreme Court. The Texas Supreme Court denied the Plaintiff's writ of error. The Plaintiff has now filed this suit in federal court against a host of Defendants under a number of theories.

## PLAINTIFF'S CLAIMS FOR RELIEF

Plaintiff seeks relief under several theories. First, that the State of Texas is liable under the fifth and fourteenth amendments to the United States Constitution for "just compensation" under a theory of "taking" by the state of Plaintiff's property. The claims against the individual Defendants are less well defined, but amount to liability under 42 U.S.C. § 1983 for their actions relating to the "taking" or the tortious exercise of the state's police power.

## DEFENDANTS' RESPONSES

The State disputes that any permanent and compensable "taking" of the Plaintiff's water system ever occurred. To the contrary, the State argues, the PUC placed the Plaintiff's "property", which was a utility, into receivership. This action, the State contends, was not a permanent taking of property. The Defendants argue that the state court receivership suit was the proper forum to determine the Plaintiff's property rights with regard to the water system. Thus the Plaintiff has no cause of action to be compensated as opposed to if the water system had

been taken under the concept of eminent domain or inverse condemnation.

The State relies heavily on the twin defenses of res judicata and statute of limitations. The State also asserts the defenses of the Eleventh Amendment and qualified immunity.

1. The 42 U.S.C. § 1983 Claims Against the Texas Attorney General and His Assistants

The Plaintiff has alleged 42 U.S.C. § 1983 claims against the attorneys who represented the state in the state case. The Court finds this claim to be spurious at best.

The Plaintiff's claims are barred by the qualified immunity that the state's attorneys have in acting within the scope of their employment in representing the state in litigation. The attorneys for the PUC did no more in defending the Plaintiff's claims against the PUC and the other state defendants than what all attorneys are ethically bound to do: zealously represent their client, and win their suits. The state's attorneys raised the defense that Plaintiff's claims should have been raised in the receivership action. At every level, the state courts ruled in favor of the Defendant. In other words, the Plaintiff seeks to hold liable attorneys that raised defenses that were endorsed by a state district judge, by the state appellate court, and by the state supreme court. The Court finds that the Plaintiff had actual notice of the receivership lawsuit and made a conscious decision not to intervene. After a careful review of Plaintiff's Exhibits P-3 and P-4, this Court rejects Plaintiff's contention that he was prohibited by any state court injunction from intervening in the receivership action. The receivership court was the appropriate forum for the Plaintiff to establish his rights concerning the water system.

Despite the fact that the Plaintiff litigated his claims in the case he filed in state court, he requests this federal Court to collaterally attack the state court litigation under the patina of a

federal civil rights claim. Plaintiff's claim that he was "deprived" of his constitutional right to be heard in the state courts is without merit. Plaintiff had notice of, but chose not to intervene in, the receivership suit. Plaintiff filed and fully litigated an inverse condemnation suit in Lubbock County, Texas. The PUC intervened in this case and had it transferred to Travis County, Texas. The Plaintiff prosecuted this case through the state court system and he lost. The federal courts do not sit to determine whether state courts properly decide legal issues. The Plaintiff has failed to prove that he was deprived of any rights in the state court system. He filed his suit. The Courts considered his claims and the defenses raised by the state. The Plaintiff lost at the trial court level, the appellate court level, and the supreme court level. There is no merit to the Plaintiff's claim that these Defendants deprived him of rights by raising a "new" defense for the first time on appeal. The decision of whether the state's attorneys raised improper legal arguments was for the state appellate and supreme courts to decide, both of which ruled in favor of the Defendants and the Plaintiff has failed to produce any evidence that the actions of the state courts or the state's attorney deprived him of any rights.

The Plaintiff has failed to establish by a preponderance of the evidence that the conduct of the defendant attorneys violated any clearly established constitutional or federal statutory rights of the Plaintiff of which an objective, reasonable person would have known. These Defendants therefore enjoy immunity from liability from the claims made by the Plaintiff. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982). The Court finds further that, regardless of the state's attorneys right to immunity, Plaintiff's claims against the state's attorneys have no merit.

The Plaintiff's claim against Attorney General Morales is without merit given the total lack of any evidence that Defendant Morales had any personal involvement in the lawsuit or that he maintained any policies, practice, or custom that resulted in the

loss of the Plaintiff's civil rights. At best, Attorney General Morales is the ultimate supervisor of the other attorneys general named as Defendants. Defendant Morales was not even the Attorney General at the time when most of the salient events occurred. Supervisors are not vicariously liable for § 1983 violations of their subordinates. Monell v. Department of Social Serv., 436 U.S. 658, 98 S.Ct. 2018 (1978). The Plaintiff presented no evidence that Attorney General Morales knew or should have known of any misconduct on the part of his subordinates--especially since the Court has seen no evidence of any misconduct on the part of the state's attorneys.

2. The Claims Against the Receiver, James Miller.

Defendant, James Miller, was appointed as the receiver for the water system after Mr. Nichols was removed by state court order. The evidence established that Defendant Miller took over an aging water system that barely serviced the nine families still on the system. Miller labored on the weekends to keep the system in working order. He did not increase the monthly payment for the service to the eight families and did not personally profit from his tenure as receiver beyond guaranteeing his own family the system as a source for water. He managed to keep the system in sufficient working order until the City of Lubbock was willing and able to provide a water source to the eight families. The Court finds that the Defendants, in any combination, did not conspire to deprive the Plaintiff of his rights concerning the water system until the City of Lubbock made water available. To the contrary, the Court commends Defendant Miller for his selfless efforts to ensure a supply of water to the handful of customers who were dependent on the water system.

Defendant Miller argues that he enjoys a quasi-judicial immunity since he was acting as the receiver. The Court disagrees and holds that Defendant Miller is not entitled to judicial immunity. Defendant Miller next argues that as the

receiver he is entitled to qualified immunity under Harlow, supra. The Court agrees. The Plaintiff is entitled to qualified immunity for all actions he took as the receiver. To the extent that the Plaintiff complains that there was a discrepancy in the inventory that Defendant Miller executed on February 1, 1988, concerning the outstanding debts of the water system; the Court finds that these complaints should have been raised in the state court in the receivership suit. The Court makes an additional finding that the statute of limitations has run on any claim against Defendant Miller.

The Court finds that the claims against this Defendant is barred by the statute of limitations. Assuming that the Plaintiff has a claim against this Defendant under 42 U.S.C. § 1983, that cause of action accrued on May 5, 1988--the date that the Order discharging the receiver became final and unappealable. The statute of limitations applicable to a § 1983 claim is the two year statute of limitations for personal injury actions. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986); Wilson v. Garcia, 195 S.Ct. 193 (1985).

3. The Claims Against John Hall.

Defendant, John Hall, holds a supervisory position with the Texas Water Commission. The Plaintiff presented no evidence of any kind against Defendant Hall. The Court heard no evidence that would support any finding of liability against Defendant Hall. Accordingly, the Court finds for Defendant Hall on all of Plaintiff's claims.

4. The State of Texas, the Texas Water Commission, and the PUC.

The Court finds that the Plaintiff has failed to prove that these Defendants violated the Plaintiff's rights under the Fifth or Fourteenth Amendments of the U.S. Constitution. The court holds that the claims against these defendants for damages are

barred by the Eleventh Amendment of the United States Constitution. Pennhurst v. State School v. Halderman, 465 U.S. 79 (1984). These parties have not waived their right to immunity under the Eleventh Amendment.

The Court finds that the claims against these Defendants are barred by the statute of limitations. Assuming that the Plaintiff has a claim against any of the Defendants under 42 U.S. C. §1983, that cause of action accrued on May 5, 1988--the date that the Order discharging the receiver became final and unappealable. The statute of limitations applicable to a § 1983 claim is the two year statute of limitations for personal injury actions. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986); Wilson v. Garcia, 195 S.Ct. 193 (1985).

The Court finds that the claim against these Defendants are barred by the doctrine of res judicata. The Court holds that, as a matter of law, between identical parties, a final judgment of a state court of competent jurisdiction on the merits of a claim will bar the party from bringing the same claim in federal court as well as any other cause of action that could have been raised and resolved in the state court. Allen v. McCurry, 101 S.Ct. 411 (1980); and Lubrizol Corp. vs. Exxon Corp., 871 F.2d 1297, 1287 (4th Cir. 1989). Plaintiff could have intervened in the receivership action, but he failed to do so. He could have raised these claims in his state court law suit but failed to do so. The Court holds that the Plaintiff is precluded from pursuing these claims by the doctrine of res judicata.

The Court finds that the Plaintiff failed to prove that these Defendants acted intentionally to deprive Plaintiff of his constitutional rights. To the contrary, the Court finds that the Plaintiff intentionally chose to forfeit his rights to compensation by deciding not to intervene in the receivership suit.

The water system in question is not typical private property, rather it is a utility within the statutory definition and

therefore is governed as is any operating utility, by the Public Utilities Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. Art. 1446(c) § 2 (Vernon 1992). This statute was in effect at the time of the receivership proceedings. Under this statute, the PUC had the express authority to impose a receivership on this utility, and could do so without compensation from the state. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2900 (1992). The Plaintiff has no legal right in this Court to force these Defendants to compensate him for the use or deterioration of the water supply system.

5. Plaintiff's Failure to Prove Damages.

The Court also makes the following determination concerning Plaintiff's claim to damages. The Court specifically rejects the Plaintiff's testimony that the water system was worth $50,000 at the time the Receiver took it over. The Court accepts as true and sworn testimony that only nine families, paying $15 per month, remained paying customers at the time of the receivership. The Court finds that the plaintiff would not have made a profit during the period of time that the water system was run by the receiver. To the contrary, the evidence is that he would have lost money. There was credible testimony that the water from the Carlisle water supply has been contaminated by the actions of an Air Force base and is now without value. The Court finds that there was nothing illegal or improper about the City of Lubbock making water available to the customers who had previously used Plaintiff's water system. Once these customers had access to a better water system, there was nothing improper about them changing to the new system. The Plaintiff has attempted to frame this as a "taking." The Court finds that no taking occurred. To the contrary, the Plaintiff's water system was operated by a receiver pursuant to a legitimate court order until a better and more reliable source became available. The court finds that the Plaintiff failed to prove that he has incurred any compensable damages.

The Court holds that the plaintiff has failed to prove any of his claims against any of the Defendants and that he has failed to prove that he has suffered any compensable damages. The court holds that the Plaintiff shall take nothing, and that the Defendant shall have judgment for their costs.

SIGNED this the 17th day of September, 1993.

_____

ALAN D. ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

*Appendix "G"*

# Supreme Court of the United States

**NO. 94-393**

**M.F. Guetersloh, Jr.,**

**Petitioner**

**v.**

**Texas, et al.**

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit, No. 93-8729.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January, 9, 1995

A true copy by
WILLIAM K. SUTER,
Clerk of the Supreme Court
Of the United States
Signed by Frances Lorson,
Chief Deputy

*Appendix "H"*

**NO. 3-90-161-CV**

**IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN**

**M. F. GUETERSLOH, JR.,
Appellant,**

**V.**

**PUBLIC UTILITY COMMISSION OF TEXAS,
Appellee.**

**From the District Court of Travis
County, 353rd Judicial District,
No. 461,447, Honorable Hume
Cofer, Judge Presiding**

Appellant, M. F. Guetersloh, Jr., complains that placing a water supply company in receivership under the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 3(c)(4) & 71A (1980) ("PURA") (see also Tex. Water Code Ann. § 13.412 (1988)), constituted a "taking" of his interest as a lien holder of the receivership property. Guetersloh sued the receiver and others for damages, and the Public Utility Commission intervened. The district court granted the Public Utility Commission's motion for summary judgment. We will affirm the district court's judgment.

## HISTORY OF THE LAWSUIT

Guetersloh sold the Carlisle Water System to Ray Nichols in 1978, retaining a vendor's lien and deed-of-trust lien to secure

payment of the note executed by the purchaser. At the time the Public Utilities Commission (the "Commission") was charged with regulation of water systems in this state PURA § 3(c)(4) (1980); jurisdiction to regulate water supply systems was transferred to the Texas Water Commission on March 1, 1986. 1985 Tex. Gen. Laws, ch. 795, § 10.003 at 2820-21 [Tex. Water Code Ann. §§13.001 - 13.515 (1988 & Supp. 1991)]. Because Nichols violated a final order of the Commission regulating the water system, the district court of Travis County appointed a receiver in 1983 to manage the system's assets and to continue service to its customers. In 1988 the court vacated the receivership.

In December 1985, while the 1983 receivership was still pending, Guetersloh alleged an "inverse condemnation action" as a lienholder of the property. The appellate record does not reflect when Guetersloh foreclosed his lien to regain possession of the water system. The gravamen of Guetersloh's complaint is that after the receiver took possession of the water system, Nichols defaulted on the promissory note and by the time Guetersloh was able to foreclose his lien, the City of Lubbock had extended water service to the Carlisle area so that the water system had little or no continuing value.

Guetersloh originally sued the receiver and the City of Lubbock, alleging that institution of the receivership constituted a "taking" of his property in violation of Article I, Section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments of the federal constitution. The Commission intervened in the suit and the Texas Water Commission and the individual commissioners of each agency were added as defendants. All defendants moved for summary judgment. In February 1989, the district court in Lubbock County granted summary judgment in favor of all defendants except the Commission and, on its own motion, transferred the remaining action to the district court of Travis County. Once in Travis County, the commission filed

another motion for summary judgment. In February 1990, the Travis County court granted the Commission's motion for summary judgment.

## REVIEW OF SUMMARY JUDGMENTS

"A summary judgment is not entitled to the same deference as a judgment resulting from a trial on the merits." HL&P v. Wheelabrator, 788 S.W.2d 933, 935 (Tex. App. 1990, no writ). "The movant must prove beyond question that it was entitled to judgment as a matter of law or this court must remand the case for a trial on the merits." Id.

The Texas Supreme Court has established the standard for reviewing a summary judgment:

* The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

* In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

* Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

## COMMISSION'S ENFORCEMENT POWERS

PURA section 71A enables the Commission to request that the court appoint a receiver for a water utility that has violated a final order of the Commission:

> (a) At the request of the commission, the attorney general shall bring suit for the appointment of a receiver to collect the assets and carry on the business of a water or sewer utility that violates a final order of the commission or allows any property owned or controlled by it to be used in violation of a final order of the commission.
>
> (b) The court shall appoint a receiver if such appointment is necessary to guarantee the collection of assessment, fees, penalties, or interest, to guarantee continued service to the customers of the utility, or to prevent continued or repeated violation of the final order.
>
> (c) The receiver shall execute a bond to assure the proper performance of the receiver's duties in an amount to be set by the court.

(d) After appointment and execution of bond the receiver shall take possession of the assets of the utility specified by the court. Until discharged by the court, the receiver shall perform the duties that the court directs to preserve the assets and carry on the business of the utility and shall strictly observe the final order involved.

(e) Upon a showing of good cause by the utility, the court may dissolve the receivership and order the assets and control of the business returned to the utility.

The summary judgment proof reveals that on July 21, 1983, the district court of Travis County appointed a receiver to take possession of and preserve the assets of Carlisle Water Supply, to carry on its business and continue servicing its customers, and to comply with the rules and regulations of the Texas Department of Health and the Commission. The order cited Nichols (d/b/a Carlisle Water Supply) for violating the Commission's final order in docket number 4647 based on the failure to: (1) repair the system's pressure tank; (2) clean up the plan site and correct improvised equipment; (3) install chlorination equipment; (4) provide monthly bills to each customer; (5) maintain adequate service at an adequate pressure at all times; (6) obtain approval from the Texas Health Department for the water service; (7) provide the Commission with monthly progress reports; and (8) report service interruptions to the Commission as ordered. The summary judgment proof further reveals that the district court in Travis County vacated the receivership and discharged the receiver on April 5, 1988, after

approving the receiver's final accounting. Guetersloh failed to controvert any of the Commission's summary judgment proof.

**POINTS OF ERROR IN GRANTING SUMMARY JUDGMENT**

Guetersloh complains that the trial court erred in granting summary judgment for the reasons set forth in three points of error: (1) the doctrine of sovereign immunity does not apply in an action based on a "taking" of property; (2) he had sufficient interest in the property to be protected from an unconstitutional "taking"; and (3) he had raised sufficient questions of fact regarding the damage to his property to preclude summary judgment in favor of the Commission.

In addressing Guetersloh's first point of error, we note that the Commission did not assert sovereign immunity as a ground on which the court might grant summary judgment. The Commission asserted sovereign immunity in support of its plea to the jurisdiction, which the court did not grant. A motion for summary judgment must state the specific grounds on which it is sought, and the court should render judgment only if "the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." Tex. R. Civ. P. Ann. 166a(c) (Supp. 1991) (emphasis added). The record does not indicate that the trial court granted summary judgment on the ground of sovereign immunity, a ground not asserted in the motion. This Court cannot reverse summary judgment on any ground not presented in the motion or otherwise in writing to the trial court in support of the motion. Id. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). We overrule Guetersloh's first point of error as it presents nothing for review.

Point of error two, asserting that Guetersloh had a property interest protected by the constitutional prohibition against a governmental "taking," also misses the mark. The Commission's motion for summary judgment asserts that

Guetersloh falsely asserted fee-simple title to the water system because the summary judgment proof established that, at the time he brought this suit he had conveyed the system to Nichols, only retaining a lien against the property. However, the motion did not assert Guetersloh's failure to own the property as a ground for granting summary judgment. Rather, the Commission's motion asserted that the receivership did not destroy Guetersloh's lien, even though as lien holder he was compelled to seek permission of the court before interfering with the operation of the receivership. Again Guetersloh has not shown that the trial court granted summary judgment on issues other than those expressly set forth in the motion. Neither the court's order nor the motion asserts lack of ownership as a ground for granting summary judgment. For the reasons set forth above, we overrule point of error two as it presents nothing for review.

In his third point of error Guetersloh argues that he has raised fact issues regarding the extent of damages to his interest in the receivership property and that these fact issues preclude summary judgment. The Commission sought summary judgment on the express grounds that the undisputed facts affirmatively negate Guetersloh's cause of action. The Commission relies on the summary judgment proof that, during the pendency of the receivership, the Commission was acting within its statutory authority to enforce its final order and, therefore, Guetersloh had no cause of action against the Commission. Once the court discharged the receivership, the Commission did not have possession of the property in question. Guetersloh did not file a verified response to the Commission's motion for summary judgment and presented no controverting summary judgment proof.

We are persuaded by the Commission's argument that this inverse condemnation lawsuit is but a thinly disguised attack on the statutory authority of the Commission, authority now transferred to the Texas Water Commission, to enforce its orders

regulating water systems. The state constitution requires the State to pay adequate compensation when taking private property for public use. Tex. Const. Ann. art. I, § 17 (1984). All private property is held subject to the valid exercise of the State's police power, but the state need not compensate for losses occasioned by the proper and reasonable exercise of its police power. Lombardo v. City of Dallas, 73 S.W.2d 475, 478-79 (Tex. 1934).

A valid exercise of police power does not constitute a "taking" if : (1) the regulation is adopted to accomplish a legitimate goal, meaning the regulation is "substantially related" to the health, safety, or general welfare of the people; and (2) the regulation is reasonable, not arbitrary. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984). The regulation of water systems is substantially related to the general welfare of the people. See Tex. Water Code Ann. § 13.001 (1988) (chapter regulating water rates and services was adopted to protect the public interest by assuring just and reasonable rates, operations and services). The power to request that a court impose a receivership on any public utility that violates a final order of the Commission is a reasonable enforcement power, subject to the due process protection of a court hearing. As a matter of law the summary judgment evidence negated any action for inverse condemnation because the Commission's authority to seek a receivership against this utility was a valid exercise of the state's policy power, rather than a "taking." See City of College Station, 680 S.W.2d at 804 (whether a police power regulation is proper or whether it constitutes a compensable taking is a question of law and not of fact). The Commission has met its burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Guetersloh has presented no remaining disputed fact issues that precluded summary judgment on this ground.

We overrule Guetersloh's third point of error and affirm the judgment of the trial court.

Bea Ann Smith, Justice

[Before Chief Justice Carroll, Justices Jones and B. A. Smith]

Affirmed

Filed: August 14, 1991

*Appendix "I"*

**CAUSE NO. 461,447**

| | | |
|---|---|---|
| **M. F. GUETERSLOH, JR..,** | § | **IN THE DISTRICT COURT** |
| **Plaintiff** | § | |
| | § | |
| **v.** | § | **OF TRAVIS COUNTY,** |
| | § | **TEXAS** |
| | § | |
| **PUBLIC UTILITY** | § | |
| **COMMISSION OF TEXAS** | § | |
| **Defendant** | § | **353RD JUDICIAL DISTRICT** |

**FINAL JUDGMENT**

On February 21, 1990, this cause was heard on Defendant Public Utility Commission of Texas' motion for summary judgment. Plaintiff appeared on his own behalf and Defendant appeared by and through the Office of Attorney General. The court has considered the pleadings and affidavits and attached exhibits, and has heard argument. It appears to the court, and the court so finds, that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law.

Wherefore, it is ORDERED, ADJUDGED, and DECREED that summary judgment be, and it hereby is, entered in favor of Defendant Public Utility Commission of Texas and that Plaintiff have and recover nothing against Defendant Public Utility Commission of Texas by his suit.

Signed February 23, 1990.

Original signed by the Honorable
HUME COFER, Presiding Judge

*Appendix "J"*

**CAUSE NO. 85-512,245**

| | | |
|---|---|---|
| **M. F. GUETERSLOH, JR.., Plaintiff** | § | **IN THE DISTRICT COURT** |
| **v.** | § | |
| | § | |
| **JAMES MILLER, D/B/A CARLISLE WATER SUPPLY, CITY OF LUBBOCK, TEXAS, THE PUBLIC UTILITY COMMISSION AND ITS COMMISSIONERS, PEGGY ROSSON, DENNIS THOMAS, JO CAMPBELL, HENRY ROLLINS, GEORGE M. COWDEN, TOMMIE G. SMITH, THE TEXAS WATER COMMISSION, PAUL HOPKINS, RALPH ROAMING, AND JOHN O. HOUCHINS,** | § | **OF LUBBOCK COUNTY, TEXAS** |
| **Defendants** | § | **137th JUDICIAL DISTRICT** |

**ORDER**

The Court, having considered the petition, pleadings and Briefs in this cause, is of the opinion that the Motion for Summary Judgment of the Defendants, Peggy Rosson, Dennis Thomas, Jo Campbell, Henry Rollins, George M. Cowden, Tommie G. Smith, Texas Water Commission, Paul Hopkins, Ralph Roaming, and John O. Houchins is proper and is hereby GRANTED.

SIGNED this the 13th day of February, 1989.

Original Signed By:

Cecil G. Puryear
Judge Presiding

*Appendix "K"*

**CAUSE NO. 85-512,245**

| | | |
|---|---|---|
| **M. F. GUETERSLOH, JR..,** | § | **IN THE DISTRICT** |
| | § | **COURT** |
| **Plaintiff** | § | |
| **v.** | § | |
| | § | |
| **JAMES MILLER, D/B/A** | § | |
| **CARLISLE WATER SUPPLY,** | § | |
| **CITY OF LUBBOCK, TEXAS,** | § | |
| **THE PUBLIC UTILITY** | § | |
| **COMMISSION AND ITS** | § | **OF LUBBOCK** |
| **COMMISSIONERS, PEGGY** | § | **COUNTY, TEXAS** |
| **ROSSON, DENNIS THOMAS,** | § | |
| **JO CAMPBELL, HENRY** | § | |
| **ROLLINS, GEORGE M.** | § | |
| **COWDEN, TOMMIE** | § | |
| **G. SMITH, THE TEXAS** | § | |
| **WATER COMMISSION,** | § | |
| **PAUL HOPKINS, RALPH** | § | |
| **ROAMING, AND JOHN O.** | § | |
| **HOUCHINS,** | § | |
| | § | |
| **Defendants** | § | **137th JUDICIAL** |
| | § | **DISTRICT** |

**ORDER**

The Court, having considered the petition, pleadings and briefs in this cause, is of the opinion that:

(1) The Motion for Summary Judgment of Plaintiff, M.F. GUETERSLOH, JR. is DENIED.

(2) The Motion for Summary Judgment of Defendant, JAMES S. MILLER, is proper and hereby GRANTED.

SIGNED this the 13th day of February, 1989.

Original Signed By:

Cecil G. Puryear
Judge Presiding

*Appendix "L"*

**CAUSE NO. 85-512,245**

| | | |
|---|---|---|
| **M. F. GUETERSLOH, JR..,** | § | **IN THE DISTRICT** |
| | § | **COURT** |
| **Plaintiff** | § | |
| | § | |
| | § | |
| **JAMES MILLER, D/B/A** | § | |
| **CARLISLE WATER SUPPLY,** | § | |
| **CITY OF LUBBOCK, TEXAS,** | § | |
| **THE PUBLIC UTILITY** | § | |
| **COMMISSION AND ITS** | § | **OF LUBBOCK** |
| **COMMISSIONERS, PEGGY** | § | **COUNTY, TEXAS** |
| **ROSSON, DENNIS THOMAS,** | § | |
| **JO CAMPBELL, HENRY** | § | |
| **ROLLINS, GEORGE M.** | § | |
| **COWDEN, TOMMIE** | § | |
| **G. SMITH, THE TEXAS** | § | |
| **WATER COMMISSION,** | § | |
| **PAUL HOPKINS, RALPH** | § | |
| **ROAMING, AND JOHN O.** | § | |
| **HOUCHINS,** | § | |
| | § | |
| **Defendants** | § | **137th JUDICIAL** |
| | § | **DISTRICT** |

**FINAL SUMMARY JUDGMENT**

The Court, after examining the pleadings, briefs, and the Summary Judgment evidence before it in the Motion for Summary Judgment filed by the Defendant and Movant, City of Lubbock, Texas is of the opinion and finds that the City of Lubbock, Texas, is entitled to Summary Judgment as follows.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that plaintiff, M.F. Guetersloh, Jr. take notion against defendant, City of Lubbock, Texas.

All relief requested and not expressly granted is denied.

SIGNED this the 13th day of February, 1989.

Original Signed By:
Cecil G. Puryear
Judge Presiding

APPROVED AS TO FORM:

Original Signed By:
Michael T. Griffin
State Bar No. 08463110
Attorney for Defendant

*Appendix "M"*

IN THE SUPREME COURT OF TEXAS

| | | |
|---|---|---|
| NO. D-1725. | ) | February 5, 1992 |
| | ) | |
| M.F. GUETERSLOH, JR. | ) | |
| | ) | |
| V. | ) | From TRAVIS County, |
| | ) | 3rd District |
| PUBLIC UTILITY | ) | |
| COMMISSION OF TEXAS | ) | |

Application of petitioner for writ of error to the Court of Appeals for the Third District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, M.F. Guetersloh, Jr., pay costs incurred on this application.

*Appendix "N"*

IN THE SUPREME COURT OF TEXAS

| | | |
|---|---|---|
| NO. D-1725. | ) | March 4, 1992 |
| | ) | |
| M.F. GUETERSLOH, JR. | ) | |
| | ) | |
| V. | ) | From TRAVIS County, |
| | ) | 3rd District |
| PUBLIC UTILITY | ) | |
| COMMISSION OF TEXAS | ) | |

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is overruled.